IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

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No. 266

WILLIAM H. BANKS WAREHOUSES, INC. AND JOHN ALFRED HALFORD,

Petitioners,

vs.

GEORGE L. WATT; WILLIAM WATT; ROLAND ULRICH; C. J. DEVISSER; MARIE DEVISSER, AND C. J. DEVISSER; C. J. DEVISSER, AS ADMR. W.W.A. OF EST. OF A. W. DEVISSER, DEC'D; FRED TRAUTWEIN; HARRY VAN GILDER; CHARLES ZACH; FRED INGRAHAM; CLYDE BACON, INC.; L. A. HARDY; FRED C. ROGERS; RUDY BONADIMAN; ALBERT ASSON; MARIO L. DALRY; ELZO R. CHUGG; CASPER G. BAGNELL; HERSCHEL BARNES; ELMORE LOVELAND; WAYNE F. GARRARD; PARKER & SULLIVAN; D. F. PARKER & KEITH PARKER; J. S. PARKER; JACK F. CHURCH; A. R. MCCUISTION; JAKE KERBS; C. C. CLARK; GUILIO MENAPACE; JOHN MARTSCH; JOHN WINN; VIVIAN WHIPPLE; ALVIN BROWN; MRS. MINNIE STEWART; ROBERT GIRARDELL; R. B. TURNER; HENRY MANNING; LELAND J. GARNER; OTTO JOHNSON; L. L. SPEVAK; W. G. SWIM, ADMR. OF EST. OF VIOLA FRIZELL, DEC'D; J. M. JAMERSON; HAROLD B. MALONE AND OLGA MALONE; D. C. PIERCE; EDWARD E. BABCOCK; HYPOTHEEK LAND COMPANY; AND FRED R. MATHERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to re-

view the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on May 15, 1952 (R. 679) and to review that Court's order of June 19, 1952, denying a petition for a rehearing *en banc* (R. 697).

OPINIONS BELOW.

The opinion of the United States District Court for the District of Idaho (R. 233-270) is reported in 96 F. Supp. 731. The opinion of the Court of Appeals (R. 678) is reported in 196 F. (2d) 1018.

JURISDICTION.

The Court of Appeals' judgment was entered May 15, 1952 (R. 679). Petition for rehearing was denied June 19, 1952 (R. 697). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. When a state court of proper jurisdiction has found warehouse license certificates issued by the state Department of Agriculture to be incorrect and beyond the Department's power to issue under the state statute, and these license certificates have been amended and corrected as of the date of their original issuance by the Department, pursuant to a judgment and a writ of mandate of that state court in such action, does a federal court have judicial power under the Constitution to deny full faith and credit to the state court judgment, to hold the state court

judgment void by adopting a contrary construction of the state statute and to hold the licensee bound by the terms of the certificates as originally issued?

2. Where a litigant petitions a Court of Appeals for a rehearing *en banc* under 28 U. S. C. Sec. 46(c) of a decision entered by a division of that Court which creates a conflict in the decisions within the Circuit, do all of the active judges of the Court have the duty to determine whether or not the petition should be entertained?

STATUTES INVOLVED.

The Idaho Bonded Warehouse Law, as it existed in 1946-1948, the period here in question, is printed in appendix D hereto, p. 49.

28 U. S. C. Sec. 46(c) provides:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unles a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

28 U. S. C. Sec. 1738, after providing a method for authenticating judicial proceedings, states:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

STATEMENT OF THE CASE.

The Issues Framed by the Pleadings.

On July 6, 1948, petitioners, a field warehouse company and its warehouseman's liability insurers, filed a complaint for declaratory judgment (R. 3) in the United States District Court for the District of Idaho, asking for a finding and declaration that they were not liable to the respondents for produce which respondents had delivered to W. Andrew Jean, doing business as Jean Seed Company, a sole proprietorship (hereinafter called Jean) at the warehouse owned and operated by Jean at Filer, Idaho, or the warehouse owned and operated by him at Rupert, Idaho, and for a further declaration that Jean was not, at either place, the agent of petitioner William H. Banks Warehouses, Inc. (hereinafter called Banks). Jean was made a party defendant, but defaulted and the complaint was taken as confessed by him (R. 219, 221-222). Respondents are all bean growers in the vicinity of Filer or Rupert, Idaho, or owners of land on which such produce was grown. Answers and counterclaims were filed by two groups of respondents, stating that Jean was Banks' agent or that Banks was estopped to deny an agency (R. 40-76; 78-176). The third group of respondents denied they delivered their produce to Jean and alleged they delivered it to Banks (R. 29-39). The latter group of respondents also filed suit against petitioners in an Idaho state court and this suit was removed to the District Court and consolidated for trial and judgment with the declaratory judgment action (R. 359, 415, 418, 487-488, 307-308).

Jean's Warehouse at Filer, Idaho.

Jean first acquired the warehouse building at Filer, Idaho, in 1943. He conducted a produce warehouse there from 1943 until April or May, 1948, receiving and weighing seed and commercial beans, and other produce; cleaning, weighing, buying and selling produce; and selling bags, twine, fertilizer and similar merchandise. He solicited business from local farmers including some of the respondents through "field men" (Finding VII, R. 313; Jean, R. 668-669; Jamerson, R. 652-653; Trout, R. 569; Moffatt, R. 542-543; Allison, R. 581-582; DeVisser, R. 617-618). He obtained a warehouse license under the Idaho Bonded Warehouse Law for the license year July 1, 1943—June 30, 1944, and another for July 1, 1944—June 30, 1945 (Stubblefield, R. 566). He did not obtain a license after July 1, 1946, but continued to conduct his business thereafter in exactly the same manner as he had done before. His assumed business name "Jean Seed Company" was registered under Idaho law (Ex. 31, R. 554).[1]

Many of the respondents who delivered their produce to the Filer warehouse had dealt with Jean for several years (*e. g.*, Jamerson, R. 652-653). All but three of the Filer respondents delivered the produce here in question to Jean at Filer in September and October of 1947 at the end of the harvest season.[2] All these respondents admitted they delivered their produce to "the Jean Seed Company Warehouse" where it was received by Jean or

1. By stipulation of counsel, the original exhibits have not been printed (R. 673-674). The record reference refers to the pages of the transcript where the exhibit was received in evidence. The exhibits pertinent to this petition for certiorari are set forth in the appendix to this brief or in the findings or other parts of the record referred to herein.

2. The remaining three delivered their produce during the 1946 harvest season (Ex. 106, 95, 197, R. 667; Summary, Ans. to Int. R. 442 at 447-448; Finding XXIX, R. 336 at 337-338).

his employees (Summary, Ans. to Int., R. 442 at 447-449 and exhibits referred to therein; also Finding XXIX, R. 336 at 337-338). The Filer respondents received in return for their produce only "scale tickets" or "memorandum receipts," stating that the produce was received by Jean Seed Company. Some also received and accepted crop settlement statements, purchase orders and checks or notes of Jean (Ex. 43-46; 92-94, 97, 98, 99, 101, 102, R. 590-591, 630-631, 653, 667; Summary, Ans. to Int., R. 442 at 447-449, 453-454).[3] Jean sold the beans of these Filer defendants before April 1, 1948, without any authorization from them and did not account to them for the proceeds of the sales (Complaint Count I, par. 18, R. 12; Default and Confession of Jean, R. 219, 221-222; Stip. R. 558).

Field Warehousing Operations of Banks at Filer.

Banks entered into a contract to perform a field warehouse service for Jean at Filer on September 21, 1946.[4] Field warehousing is essentially a security transaction carried on through the medium of warehousing. A warehouse is established by the field warehouse company on the borrower's premises, property of the borrower is delivered to and accepted by the field warehouse company which then issues its own warehouse receipts on such property to the borrower or the borrower's creditor who, in turn, holds the warehouse receipts in pledge as security for loans to the borrower.[5] In order to carry out the con-

3. Sample copies of the scale tickets, memorandum receipts and crop settlement statements are set forth in appendix C hereto at pp. 46-48; also at R. 453-454.

4. Ex. 1, R. 493, Finding IX, R. 315; set forth in appendix B pp. 40-45.

5. Caris, R. 491-492. The nature and function of field warehousing is explained in Kane, *The Theory of Field Warehousing*, 12 Wash. L. Rev. 20 (1937); Birnbaum, *Form and Substance in*

tract, Banks leased part of the premises from Jean, posted its own warehouse signs on the premises, accepted produce which Jean certified to be his own, issued its non-negotiable warehouse receipts on this produce and delivered them to various banks or other creditors of Jean in Idaho and elsewhere (Ex. 16, 17, R. 504-505; Finding VIII, R. 314-315; Ex. 2, R. 495; Kelley, R. 521, 532, 535-536; Moffatt, R. 537-538). None of respondents ever held any of Bank's warehouse receipts.[6]

Jean's Warehouse at Rupert, Idaho.

At Rupert, Idaho, Jean acquired a warehouse building in the spring of 1947 and opened for business in the summer of that year. He solicited depositors, advertised his business and accepted produce delivered there by the Rupert respondents (Finding XIX, R. 327; also Moffatt, R. 545; Simmons, R. 579; Coffman, R. 607-608; Finding XXVI, R. 332-334. Summary, Ans. to Int., R. 442 at 449-452). The Rupert respondents admit they delivered their produce to Jean and received in return only scale tickets or memorandum receipts showing the produce was received by Jean (Summary, Ans. to Int., R. 442 at 449-452, and exhibits referred to therein). Jean sold their produce prior to April 1, 1948, and did not account to them for the proceeds (Complaint, Count II, par. 14, R. 16; default and confession of Jean, R. 219, 221-222; Stip., R. 558).

Field Warehousing, 13 Law and Contem. Prob., 579 (1948); Friedman, *Field Warehousing*, 42 Colum. Law Rev. 991, (1942); and in Jacoby and Saulnier, *Financing Inventory on Field Warehouse Receipts*, National Bureau of Economic Research, 1944. The authors of the latter work point out, p. 43, that in mid-1941 the aggregate bank loans secured by field warehouse receipts were estimated at $130,000,000.

6. All but two of Banks' receipts were returned or cancelled prior to July 1, 1947. The other two were issued thereafter and returned to Banks in March or early April of 1948 (Ex. 2, R. 495; Caris, R. 495; Branch, R. 505; Kelley, R. 521).

Jean never had or applied for a warehouse license at Rupert.

Banks Did Not Establish a Field Warehouse at Rupert, Idaho.

At one time, Jean thought he would need field warehouse services of Banks at Rupert and a lease was executed in anticipation of this need. However, he later changed his mind. Banks never entered into possession under the lease, never accepted any goods at Rupert or issued any warehouse receipts there and never did any acts there as a warehouseman or otherwise (Ex. 15, R. 504-505; Finding XIX, R. 327; Caris, R. 494-495; Branch, R. 505-507; Moffatt, R. 540-541). None of the Rupert respondents testified that they had knowledge of any acts of any kind performed by Banks at Rupert.

The Claims of Respondents.

In June, 1948, after it appeared that Jean was in financial difficulties, all the respondents made claim for the value of their produce against Banks (Complaint, Count I, par. 21, R. 12; Count II, par. 17, R. 16-17; Answers Watt, *et al.*, R. 34, 38; Ulrich, *et al.*, R. 45-46, 54-55; Ingraham, *et al.*, R. 83, 92-93). After investigating the claims, Banks denied liability and brought the declaratory judgment action in order to obtain judicial determination of the questions involved.

Basis of the District Court's Decision.

The issue framed by the pleadings, as previously stated, was whether or not Jean was Banks' agent, or whether or not the circumstances were such as to estop Banks from denying agency. The District Court, however, refused to

make any finding on the agency question and stated in its opinion:

> "The question as to whether Jean was Banks' agent is not controlling here. The main question is: Was Banks the Warehouseman? This must be answered in the affirmative. Banks is liable whether or not Jean was its agent. The fact that the bean growers continued to deliver the beans to Jean at such warehouses is not material." (R. 269.)

The District Court based its judgment and opinion that Banks was the "Warehouseman" at each warehouse on certain warehouse licenses issued to Banks by the Idaho Department of Agriculture.

The License Question.

Before Banks started to do business in Idaho, its officials conferred with the Commissioner of Agriculture and fully explained the nature of its field warehousing operations. The Commissioner ruled that where Banks accepted agricultural produce for storage in one of its field warehouses, it was required to obtain a license for such warehouse under the Idaho Bonded Warehouse Law (Caris, R. 501-502; see also Idaho state court's findings, Ex. 32, R. 555; appendix A, p. 32). Accordingly, when Banks decided to operate a field warehouse in the warehouse at Filer in the fall of 1946, it applied for a license to do so on September 25, 1946. The license was issued September 27, 1946, and the license certificate stated, in words typed in by the Department, that it was a "License to certify that William H. Banks Warehouses, Inc., may operate through State Warehouse 537" (Jean's Filer Warehouse) (Findings XI, XIII, R. 316, 319). This license expired June 30, 1947, but on June 24, 1947, Banks applied for a new license for the period July 1, 1947—June 30, 1948. Also, to be prepared for the field warehouse op-

erations it contemplated at Rupert, Banks applied for another license on August 12, 1947. The applications were for licenses for Banks alone and did not mention Jean nor Jean's warehouses in any manner (Findings XVII and XXI, R. 323, 327). License certificates for the year July 1, 1947—June 30, 1948 were issued April 1, 1948, which was long after respondents had delivered their produce to Jean at the respective warehouses. There was no evidence that any of the respondents ever saw any of these license certificates. The license certificates were issued on the basis of the applications alone without any further action of Banks. Both 1947-1948 certificates stated Banks was licensed "to conduct the Jean Seed Company" (Findings XVIII and XXII, R. 325, 329). This language was inserted by an employee of the Idaho Department of Agriculture without the knowledge of Banks and contrary to the applications (Ex. 34, 32, R. 555, appendix A, pp. 28-29, 33-34). Banks requested the Department of Agriculture in June, 1948, to amend the 1947-1948 license certificates, deleting this language and substituting the words "William H. Banks Warehouses, Inc., warehouse." When the Department refused on July 13, 1948, Banks instituted a petition for writ of mandate in an Idaho state court on July 20, 1948, to require the Department to make the amendments. The writ was granted and the amendments made prior to the trial of the declaratory judgment action (Ex. 32-34, R. 555; Finding XXIII, XXIV, R. 331, 332; appendix A, pp. 25-38). The Idaho court stated in its opinion:

> "As written, the wording of neither license number 220 nor license number 217 makes sense. * * *
>
> "We have, then, two warehouse licenses erroneously worded and erroneously issued where the patent errors are refused correction by the defendant Department upon the advice and direction of the State Attorney General. * * *
>
> "Just how third parties can have a vested legal

right in these errors, to prevent their correction, is beyond the imagination of this Court. * * *" (Ex. 34; appendix A, pp. 28, 29.)

The District Court, however, in finding petitioners liable, based its decision on the license certificates as they were before amendment and stated in its opinion:

"* * * The bean growers had a right to rely on, and Banks is bound by, the licenses as they were before amendment." (R. 250.)

It also decided as a conclusion of law:

"5. That the application made by Banks for a writ of mandate to the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada and the issuance of the writ of mandate by said Court requiring the Commissioner of Agriculture of the State of Idaho to strike from Licenses No. 220 and 217 the words 'Jean Seed Company' and to substitute therefor the words 'Wm. H. Banks Warehouses, Inc., Warehouse', and said Commissioner's acts in changing said licenses to conform with said judgment could not and did not affect the rights of the defendants in Case No. 2587 and the plaintiffs in Case No. 2590, who were not made parties to said suit, *and that said Judgment is without any effect and is void as to the said defendants and said plaintiffs*" (R. 344, Emphasis added).

The Court's reliance on these original licenses, as fundamental to its whole opinion holding that Banks was conducting each warehouse, is further shown by its language at R. 250 where it speaks of "* * * the warehouses of Banks called the Jean Seed Company warehouse", R. 264, 265, 268 where it speaks of Banks operating the warehouses "* * * under the name of Jean Seed Company" and R. 267 where the Court states Banks had licenses to operate the warehouses in the name of Jean Seed Company.

Proceedings in the Court of Appeals.

Banks filed notice of appeal to the Court of Appeals for the Ninth Circuit on August 29, 1951. The court heard oral argument May 8, 1952 and handed down a *per curiam* opinion May 15, 1952, affirming the District Court's decision "on the grounds and for the reasons set forth in the District Court's opinion" (R. 678). Petition for rehearing (R. 681-695) was filed June 15, 1952, pointing out, among other things, that the decision created a conflict in the decisions of the Court of Appeals on the question of the legality of field warehousing. The petition was addressed to all the circuit judges and asked for a rehearing *en banc*, in view of this conflict and the importance of the question to banks and federal lending agencies, such as R. F. C. The petition for rehearing was not passed on by all the judges, but only by the division which originally heard the case and it was denied on June 19, 1952 (R. 697).

SPECIFICATION OF ERRORS.

1. The Courts below acted in excess of their judicial power in holding petitioners bound by the terms of the warehouse license certificates as they existed before amendment, in holding the decision of the Idaho state court void, and in thus refusing to give full faith and credit to the state court decision.

2. The Courts below erred in their conclusions and holdings that, as a matter of law, Banks was the "warehouseman" at the Filer warehouse and at the Rupert warehouse because of its applications and license certificates.

3. The Courts below erred in their conclusions and holdings that petitioners were estopped to deny liability to respondents.

4. All the Judges of the Court of Appeals had the duty to pass on whether the petition for rehearing *en banc* should be entertained.

REASONS FOR GRANTING THE WRIT.

1. The District Court Acted in Excess of Its Judicial Power When It Grounded Liability of Petitioners on Its Own Construction of a State Statute Which Was Directly Contrary to the State Court's Construction of the Same Statute and Refused to Be Bound by the State Court's Judgment Which Held Invalid the Same License Certificates Which Formed the Basis for the District Court's Decision.

Since the Court of Appeals affirmed the District Court's decision "on the grounds and for the reasons stated in the District Court's opinion" (R. 678), it is necessary to analyze that opinion to determine the basis of the decision.

If liability is to attach to petitioners, it must be upon one or more of the following theories:

1. That Jean was the actual or apparent agent of Banks at both warehouses, or that Banks was estopped to deny agency.
2. That Banks was the actual warehouseman at both warehouses or that Banks was estopped to deny it was the warehouseman.
3. That the license certificates issued to Banks made it the warehouseman at both warehouses as a matter of law without regard to any estoppel.

Although the first theory was the one on which issues were framed by the pleadings, the District Court rejected it entirely and stated (R. 269):

> "The question as to whether Jean was Banks' agent is not controlling here. The main question is: Was Banks the Warehouseman? This must be answered in the affirmative. Banks is liable whether or not Jean was its agent. The fact that the bean growers continued to deliver the beans to Jean at such warehouses is not material."

The District Court did not find or state in its opinion that Banks was the actual warehouseman at each warehouse, as indeed it could not, as there was no evidence that any of the respondents actually dealt with Banks as a warehouseman, or in any other manner, and the testimony is undisputed that Banks never commenced warehouse or any other operations at Rupert. This leaves only the ground that Banks was estopped to deny it was the warehouseman at each warehouse or the ground that the license certificates issued to Banks made it the warehouseman as a matter of law without regard to any estoppel. As a matter of fact, the District Court jumbled both these theories together in holding petitioners liable, but when the Court's discussion of estoppel (R. 264-269) is properly analyzed, it will be seen that actually the Court held petitioners liable on the third theory alone.

It must be remembered that the licenses in question were applied for by Banks on June 24, 1947 (Filer) and August 12, 1947 (Rupert), but the license certificates were not issued until April 2, 1948. (Findings XVII, XXI, XVIII, XXII, R. 323, 327, 325, 329). Therefore, the license certificates cannot create any estoppel in fact because they could not have been observed by any of the respondents in the fall of 1947 when the produce was delivered to Jean at the warehouses and there was no evidence that any of the respondents ever saw or relied upon the license certificates. Furthermore, Banks did nothing at Rupert other than to obtain a written lease and apply for a license. There is no evidence that any of the respondents knew of either act. Under Idaho law, the lease was not notice to them, even though it was recorded. *Maxwell* v. *Twin Falls Canal Co.*, 49 Idaho 806, 292 P. 232 at 235 (1930). There is thus not a single thing which Banks did at Rupert which could create any estoppel in fact. Therefore, the entire estoppel

at Rupert must be based on the language of the license certificate issued April 2, 1948.

The District Court made no distinction between Rupert and Filer, and therefore, the basis of its decision at Filer must be the same as its decision at Rupert—*i.e.* an estoppel because of the legal effect of the language of the license certificate rather than estoppel by facts and circumstances.

This reliance on these license certificates necessarily involves a holding by the Court that the license certificates issued April 2, 1948 were legal licenses—that is, they were in a form which the Department of Agriculture had power and authority to issue—and that they, without more, created a warehouse relationship between Banks and respondents. Obviously, if the Idaho Department of Agriculture had no power to issue such certificates, the certificates in and of themselves could not have created any such legal relationship.

By basing its estoppel grounds and reasons on the legal effect of the license certificates, the Court necessarily merged this ground with the third theory—the theory that the license certificates issued to Banks on April 2, 1948, made it the warehouseman at both warehouses as a matter of law, without regard to any estoppel in fact.

The third theory of liability—that the language of the license certificate alone made Banks liable—is the foundation for the District Court's discussion and analysis of the Idaho Bonded Warehouse Law (R. 251-264). Unless that law can be construed as giving the Department of Agriculture power to force one person (Banks) to accept authority over and responsibility for the business of another (Jean), the statute cannot affect the relations between Banks and respondents because the evidence is uncontroverted that none of the respondents dealt with Banks as a warehouseman or in any other manner at either Filer or Rupert and the District Court refused to find any agency

between Jean and Banks. Therefore, the District Court construed the statute as giving the Department power to issue a license to Banks "to conduct the Jean Seed Company" and held Banks legally bound by the terms of such a license by the mere act of applying for a license in its own name.

Having adopted the theory that the license certificates alone made Banks liable, the District Court, as above pointed out, necessarily had to and did decide that the certificates as originally issued April 2, 1948, were legal, correct certificates under the Idaho law. In so holding, however, the District Court exceeded its judicial power under the Constitution because it denied full faith and credit to the decision of an Idaho state court, and it also construed an Idaho statute in a manner contrary to the construction adopted by an Idaho state court.

When Banks first saw the license certificates, which stated it was licensed "to conduct the Jean Seed Company", it asked the Idaho Department of Agriculture to amend and correct them. When the Department refused, Banks instituted an action for a writ of mandate in an Idaho court against the Department to require an amendment of the license certificates. The Idaho Court found and held the license certificate to be "erroneously worded and erroneously issued" and that the Department had no power or authority under the Idaho statute to issue such a license (Ex. 34, R. 555; appendix A, p. 28). It also found and held that the error was the fault of the Department, not Banks, and that Banks had acted with due dispatch in requesting an amendment (Ex. 34, 32, R. 555; appendix A. 27, 36). The Idaho court ordered the Department to amend and correct the licenses as of their date of issuance, and this was done prior to the trial in the District Court (Ex. 36, 37, R. 555; Findings XXIII, XXIV, R. 331-332). The District Court, in its opinion, carefully set forth and

considered the original licenses and the amendments, as well as the proceedings in the Idaho state court (R. 236-249), and then held that respondents

> "* * * had a right to rely on and (petitioner) Banks is bound by, the licenses as they were before amendment" (R. 250).

It also stated, as a conclusion of law, that the Idaho court's judgment was void as to petitioners and respondents (R. 344). As above pointed out, the quoted statement is fundamental to the entire opinion of the District Court.

By deliberately rejecting the Idaho court's judgment, the District Court acted in excess of its powers under the full faith and credit clause of the Constitution.[7] The District Court also encroached upon a state court interpretation of its own state statutes, a field reserved to the states by the Tenth Amendment.

This Court has carefully restrained the lower federal courts from such encroachment. In *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496 (1941) and again in *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942), this Court reiterated the principle that questions relating to the interpretation of state statutes and the powers of state administrative officers acting thereunder should be decided in the first instance by state, not federal courts. In *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), this Court held that a federal court sitting in a diversity case was bound by the Constitution to follow state common law as set forth in state decisions. As these cases point out, no other course will insure the harmonious operation of our federal system.

The instant case presents a flagrant violation of these

7. United States Constitution, Art. 4, Sec. 1. Also, the District Court violated 28 U. S. C. 1738. *Huron Holding Company* v. *Lincoln Mining Co.*, 312 U. S. 183 (1941); *Davis* v. *Davis*, 305 U. S. 32 (1938).

principles. Here the Idaho court held the license certificates of April 2, 1948, to be "erroneously worded and erroneously issued" and ordered them corrected. The licenses were corrected. When faced with the very same license certificates, the District Court held the original, not the amended, license certificates to be the valid and controlling ones—a clear denial of full faith and credit to the Idaho decision. Also, the District Court's opinion necessarily held the original license certificates were valid, legal licenses, within the power of the Idaho Department to issue under the Idaho statute. This is a flat rejection of the Idaho court's construction of the Idaho statute—that the Department had no power to issue such a certificate. If, as stated by Mr. Justice Frankfurter in *Pullman* and by Mr. Justice Douglas in *Fieldcrest*, a federal court should refrain from construing a state statute in the first instance, it must follow that when a state court has construed the statute and defined the powers of state administrative officers acting thereunder, the federal court is bound by such construction and definition and exceeds its judicial power when it ignores this construction and definition and adopts a contrary one.

The only ground the District Court suggested for denying full faith and credit to the Idaho decision was that respondents had some kind of an interest in the original licenses and should have been parties to the state court action. In fact, the District Court stated it was a "startling proceedings" that petitioner, Banks, should have instituted the state court action to amend the licenses (R. 249). Certainly, if *Pullman* and *Fieldcrest* have any present day application, an Idaho court was the proper, in fact the only, forum in which Banks could properly try the question of whether the licenses were correct or within the Department's power to issue. The state

court considered the problem of whether any other parties were necessary or proper in its action and stated:

> "* * * This question is purely one between the petitioner (Banks) and the defendant Department of Agriculture over such errors in the issuance of petitioner's warehouse licenses. The errors should have been corrected without putting petitioner to the costs and expense of this suit.
>
> "Just how third parties can have a vested legal right in these errors, to prevent their correction, is beyond the imagination of this Court." (Ex. 34, R. 555, appendix A, p. 25.)

If the Department of Agriculture had no power to issue the original licenses, they were void; if it did have power, they were valid;—but, in either event, the only necessary or proper parties to such a determination were Banks, the licensee, and the Department, the issuer of the licenses.[8]

The action of the District Court in directly overruling the decision of the Idaho court on the very license certificates involved in its own case, its conclusion that the Idaho court judgment was void, and the action of the Court of Appeals in sanctioning these proceedings, are such departures from the accepted and usual course of judicial proceedings under the full faith and credit clause, the Tenth Amendment and the decisions of this Court as to call for an exercise of this Court's power of supervision.

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8. It should also be noted that the Idaho Bonded Warehouse Law (appendix D, p. 49) gives no rights to anyone other than the applicant to be heard on whether or not a license should be granted (sec. 67-206) or revoked (sec. 67-228).

2. When a Court of Appeals Decision Decided by One Division of That Court Creates a Conflict With Decisions of Other Divisions Within the Circuit, and a Litigant Files a Petition for Rehearing en Banc on the Ground of Such Conflict, All the Active Circuit Judges in the Circuit Have the Duty to Pass on the Question of Whether the Petition for Rehearing en Banc Should Be Entertained.

In the instant case a petition for rehearing *en banc* was addressed to all the circuit judges of the Ninth Circuit pointing out, among other things, the conflict between the decision of the division that heard this case and decisions of other divisions of the court on the question of field warehousing (R. 681-695). The petition was considered and denied only by the judges of the division which originally heard the case (R. 697). This denial of the petition for rehearing *en banc* therefore raises the same issue presented to this Court in the pending petition for certiorari to the Court of Appeals for the Ninth Circuit in the case of *Western Pacific Railroad Corporation, et al.* v. *Western Pacific Railroad Company, et al.*, October Term, 1952, No. 150. (The opinion of the Court of Appeals is not yet reported.) Since the present case presents a conflict with other decisions of the Ninth Circuit, it further illustrates the need for all the Judges of that Court to give consideration to whether a petition for rehearing *en banc* should be entertained.

The Ninth Circuit has had several cases before it involving the legality of field warehousing. In *Heffron* v. *Bank of America* (CCA-9, 1940) 113 F. (2d) 239, and again in *Barry* v. *Lawrence Warehouse Co.* (CA-9, 1951) 190 F. (2d) 433 the Court held field warehousing to be a legal and useful business, which is in accord with the decisions of this Court in *Union Trust Co.* v. *Wilson*, 198 U. S. 530 (1905) and *Security Warehousing Co.* v. *Hand*, 206 U. S.

415 (1907).[9] But the opinion of the District Court in the present case (adopted by the Court of Appeals) stated (R. 263):

> "I again state that a field warehousing business has no place under the statutes of the State of Idaho."

This statement was made without any reference to the Uniform Warehouse Receipts Act, in effect in Idaho, which had been held to be the controlling statute in the earlier field warehouse cases decided by the Court of Appeals.

Sound judicial administration requires that all the judges of the Court of Appeals consider and pass on the question of whether a rehearing *en banc* should be granted when a conflict in decisions within the Circuit is presented. The burden of resolving such conflicts should rest on the Court of Appeals, not on this Court. This principle was recognized and required to be carried out by this Court in *United States ex rel. Robinson* v. *Johnston*, 316 U. S. 649 (1941) where this Court pointed to a conflict of decisions within the Ninth Circuit and remanded the case:

> " * * * for further proceedings, including leave to petitioner to apply for a hearing before the court *en banc.*"

citing *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326 (1941). The 1948 revision of the Judicial Code adopted the result of the *Textile Mills* decision in Sec. 46(c) of Title 28 U. S. C. (Reviser's note 28 U. S. C. A. Sec. 46(c)). As pointed out at p. 28 of the petition for certiorari in the *Western Pacific* case, the Court of Appeals for the District of Columbia Circuit and also for the Third Circuit entertain and pass on petitions for rehearing *en banc.*

This question has had a stormy history in the Ninth Circuit, culminating in the opinion striking a petition for

9. Field warehousing has also been upheld by District Courts within the Ninth Circuit in *Equitable Trust Company* v. *White Lumber Co.* (D. C. Idaho, 1930) 41 F. (2d) 60, and *In re C. A. Taylor Log & Lumber Co.* (D. C. Wash. 1925) 41 F. (2d) 249.

rehearing *en banc* in the *Western Pacific* case, and the vigorous dissent of Chief Judge Denman. The background is well presented in pages 29 and 30 of the petition for certiorari filed in the *Western Pacific* case. The Court of Appeals has power to consider a petition for rehearing *en banc* under the statute and its duty to do so has been pointed out by this Court in the *Robinson* case, as Judge Denman clearly stated in his dissent in the *Western Pacific* case. A standard procedure can and should be provided by Court rule within the Circuit. But the power is inherent in the Court of Appeals whether or not it has adopted a specific rule and the duty is clear. Therefore, the Court of Appeals has failed to perform its duty by refusing to have the petition for rehearing *en banc* passed upon by all the judges.

CONCLUSION.

We respectfully submit that this petition for certiorari should be granted.

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